No. 94-704

Supreme Court, U.S.
FILED
NOV 18 1994
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THE CITY OF CHICAGO,
Petitioner,
v.
JAMES M. ALEX, *et al.*,
Respondents,

THE CITY OF CHICAGO,
Petitioner,
v.
MICHAEL M. MCKITTRICK, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS A. WOODLEY
(*Counsel of Record*)
DOUGLAS L. STEELE
MULHOLLAND & HICKEY
1125 15th Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 833-8855

STEPHEN B. HORWITZ
JACOBS, BURNS, SUGARMAN & ORLOVE
300 West Washington Street
Suite 1200
Chicago, IL 60606-2002
Attorney for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

16 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
I. THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT	4
II. THE CLAIMED IMPACT ON THE PETITIONER OF PAYING OVERTIME COMPENSATION TO ITS PARAMEDICS IS IRRELEVANT	9
III. THE DECISION BELOW DOES NOT IGNORE THE PLAIN LANGUAGE OF THE DEPARTMENT OF LABOR'S REGULATIONS	12
CONCLUSION	13

TABLE OF AUTHORITIES

CASES	Page
Alex v. Chicago, 29 F.3d 1235 (7th Cir. 1994)	6, 7
Alexander v. Kansas City, 1993 U.S. Dist. Lexis 14505 (D. Kan. 1993)	4
Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981)	11
Bond v. City of Jackson, 939 F.2d 285 (5th Cir. 1991)	4, 7
Jewell Ridge Coal Corp. v. United Mine Workers Local 6167, 325 U.S. 161 (1945)	11
Justice v. Metropolitan Government, 4 F.3d 1387 (6th Cir. 1993)	4, 7
Tennessee Coal, Iron and Rail Co. v. Muscoda Local 123, 321 U.S. 590 (1944)	11
Torres v. American R. Co., 157 F.2d 255 (1st Cir.), *cert. denied*, 329 U.S. 782 (1946)	11
Walling v. Helmerich & Payne, Inc., 323 U.S. 37 (1944)	11
Wouters v. Martin County, 9 F.3d 924 (11th Cir. 1993), *cert. denied*, No. 93-1867 (Oct. 3, 1994)	2, 4, 8, 9

STATUTES	
29 U.S.C. § 207(a)	3
29 U.S.C. § 207(k)	*passim*

REGULATIONS	
29 C.F.R. § 553.201(a)	3
29 C.F.R. § 553.210	*passim*
29 C.F.R. § 553.215	*passim*
29 C.F.R. § 553.230(c)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-704

THE CITY OF CHICAGO,
Petitioner,
v.
JAMES M. ALEX, *et al.*,
Respondents,

THE CITY OF CHICAGO,
Petitioner,
v.
MICHAEL M. MCKITTRICK, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case arises under the Fair Labor Standards Act [hereinafter "FLSA" or "Act"], and it involves the petitioner's unsuccessful attempt to treat its medical service employees as employees engaged in "fire protection activities" in order to take advantage of a limited overtime exemption under section 7(k) of the Act. 29

U.S.C. § 207(k). The petitioner's primary argument in seeking review by this Court is a claimed conflict among the circuits as to the proper test for determining when public ambulance service employees are subject to the section 7(k) partial overtime exemption. As explained in Part I, *infra*, and contrary to the petitioner's contention, the decision of the Seventh Circuit in this case is not in conflict with the decision of the Eleventh Circuit in *Wouters v. Martin County*, 9 F.3d 924 (11th Cir. 1993). In fact, this Court denied *certiorari* in the *Wouters* case on October 3, 1994 (Docket No. 93-1867), and nothing has changed since that time to warrant further review by this Court.

The respondents are paramedics employed by the petitioner, City of Chicago. They work in the Bureau of Emergency Medical Services of the petitioner's fire department. The paramedics are in a job classification separate from the classification for fire fighters. Candidates for paramedic and fire fighter positions must meet different qualifications for hiring, and are selected from separate eligibility lists.

The paramedics operate ambulances or mobile intensive care units, and their mission is to provide emergency medical care and pre-hospital life support, especially in the more serious medical incidents involving heart attacks, diabetic reactions, etc. The paramedics do not perform any fire protection activities or duties. Specifically, the paramedics are not authorized to engage in, and do not perform, any duties in connection with fire suppression, control, prevention, inspections, or any activities related to the job of fire fighting.

Under applicable policies and orders of the fire department, the paramedics are not authorized to enter burning buildings or smoke laden or contaminated areas. Fire fighters and specialized rescue personnel extricate victims from hazardous situations; the paramedics do not perform those functions. Indeed, paramedics are subject

to discipline if they engage in fire protection or rescue activities. Nevertheless, the City has chosen to treat the paramedics as fire protection employees under the section 7(k) exemption, in order to avoid paying overtime compensation that would otherwise be due.

Section 7(a) of the FLSA generally requires that employees must be paid overtime compensation after working in excess of 40 hours per week. 29 U.S.C. § 207 (a)(1). Congress enacted a narrow exception to this overtime requirement, section 7(k), which provides for a higher hourly overtime standard for employees engaged in "fire protection activities." During the time period relevant to this action, the petitioner invoked the fire fighting employees' exemption and declined to pay the paramedics overtime compensation until they worked in excess of 136 hours in an 18-day work period.[1] Finding that the dispositive facts were not in dispute, on cross-motions for summary judgment the District Court decided that petitioner did not carry its burden of proving compliance with the Labor Department's regulations and letter rulings which govern application of the section 7(k) exemption.

In a decision issued on July 21, 1994, the Court of Appeals for the Seventh Circuit, without dissent, affirmed the District Court's ruling. Applying section 7(k) and the Labor Department's regulations set forth at 29 C.F.R. §§ 553.210 and 553.215, the Seventh Circuit concluded that the paramedics had not received "training in the rescue of fire, crime, and accident victims" as required by the regulations. Accordingly, the court determined that the petitioner was not entitled to avoid the general obligation to pay overtime compensation based on the tradi-

---

[1] Under the Labor Department's regulations, fire protection employees do not receive overtime compensation until hours worked during an applicable work period exceeded a rate of 53 hours per week (up to the maximum level of 212 hours in a work period of 28 days). *See* 29 C.F.R. §§ 553.201(a), 553.230(c).

tional 40-hour work-week standard by treating its paramedics as exempt fire protection employees under section 7(k).

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT

The petitioner's main argument in support of its petition is that the circuits are split as to the proper test for determining when public sector emergency medical service personnel are subject to the partial overtime exemption contained in section 7(k) of the FLSA for employees in "fire protection activities." The petitioner argues that one test is being applied by the Seventh Circuit in the decision below, as well as the Sixth Circuit in *Justice v. Metropolitan Government*, 4 F.3d 1387 (6th Cir. 1993) and the Fifth Circuit in *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991), while a different test is being applied by the Eleventh Circuit pursuant to its decision in *Wouters v. Martin County*, 9 F.3d 924 (11th Cir. 1993), *cert. denied*, No. 93-1867 (Oct. 3, 1994).

As explained below, however, the Eleventh Circuit did not adopt a contrary test in *Wouters*. In fact, the Eleventh Circuit remanded to the district court the question of the appropriate test to determine when public sector paramedics and emergency medical technicians are subject to the partial overtime exemption provided in section 7(k) of the Act. Thus, there is not a split of authority because the circuit courts that have reached the issue have consistently applied the same test, while the Eleventh Circuit in *Wouters* merely remanded that question for further development and application by the district court in that case.[2]

---

[2] The petitioner also claims that there is a "split" between the decisions of the Fifth, Sixth, and Seventh circuits, on one side, and the decision in *Alexander v. Kansas City*, 1993 U.S. Dist. Lexis 14505 (D. Kan. 1993), on the other. As noted by the district court

The regulatory provisions at issue are 29 C.F.R. §§ 553.210 and 553.215. Section 553.210(a) provides in relevant part:

> [T]he term "any employee . . . in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. . . . The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.215.[3]

Section 553.215(a) provides in relevant part:

> Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection activities or law enforcement activities

---

in *Alexander*, however, the Tenth Circuit has not addressed the application of section 7(k) to public sector emergency medical service employees. Even assuming, *arguendo*, that the district court decision in *Alexander* may be in conflict with other circuit court decisions, the appropriate venue to address the asserted disparity is the Tenth Circuit. The district court decision in *Alexander* can not create a "conflict" within the meaning of Rule 10.1(a) of the Rules of this Court.

[3] The quotation of 29 C.F.R. § 553.210 contained at page 7 of the City's petition glaringly omits the cross-reference to 29 C.F.R. § 553.215. This omission is significant because that cross-reference to § 553.215 strongly supports the holding by the court below, as well as the decisions by the courts in *Justice* and *Bond*, *supra*.

> of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. . . .

In the instant case, the paramedics are employed by the City's fire department within its Bureau of Emergency Medical Services. For that reason, the Seventh Circuit initially focused its inquiry on the language contained in section 553.210. As set forth above, that section provides that the phrase "any employee . . . in fire protection activities" would include "rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. *See § 553.215.*" 29 C.F.R. § 553.210(a) (emphasis added). The petitioner has argued, in essence, that in interpreting section 553.210, courts should ignore the cross-reference to section 553.215, and instead treat the "integral part" language of 29 C.F.R. § 553.210 as a separate test that is substantively different from the more detailed test contained in 29 C.F.R. § 553.215. The Seventh Circuit rejected this argument, stating that:

> We agree with the plaintiffs and the Sixth Circuit in *Justice* that the regulations only state one test for the § 7(k) exempt status of publicly employed emergency medical personnel. . . . The cross-reference to .215 most likely indicates that the fleshed-out formulation of that section is the appropriate test to apply to ambulance personnel from any public agency.

Alex v. Chicago, 29 F.3d 1235 (7th Cir. 1994), Pet. App. 10a-11a. As the court noted, this holding is strongly supported by the relevant regulatory history. When the Department of Labor issued its regulations, it

also addressed certain outside comments that had been made with respect to section 553.210:

> The legislative history of the 1974 FLSA Amendments . . . clearly indicates that only those employees who are engaged in ambulance or rescue service activities which are *substantially related* to fire protection or law enforcement activities can qualify for these exemptions . . . . As discussed above in the analysis of the comments on § 553.210, the Congress clearly intended that only those ambulance and rescue service employees whose activities are substantially related to fire protection or law enforcement activities can qualify for exemption under sections 7(k) or 13(b)(20).

See 52 Fed. Reg. 2022 (January 16, 1987) (emphasis in original); *cited in Alex*, Pet. App. 12a. The Seventh Circuit reasoned that:

> By echoing the locution of .215 in explaining the "integral part" language of .210, the Labor Department has confirmed what the cross-reference "See § 553.215" strongly implies: that the substantial relatedness of the services of a fire department's ambulance personnel to the agency's fire protection activities, as explicated in .215, tests such personnel's eligibility for section 7(k) exemption just as it tests all publicly employed ambulance personnel's eligibility for the exemption. Section 53.210 describes in general terms what § 553.215 expounds in more detail.

Id., Pet. App. 12a-13a.

Thus, the court below reasoned that there is actually only one test to be applied in determining whether ambulance and rescue service employees of a public agency fall within the section 7(k) partial overtime exemption. This conclusion is consistent with the analysis of the Sixth Circuit in *Justice*, 4 F.3d at 1393-95, as well as the holding by the Fifth Circuit in *Bond*, 939 F.2d at

287. Furthermore, these decisions recognize the importance of uniform and fair application of federal law because they assure that similarly situated emergency medical service employees will be treated similarly for overtime purposes under the FLSA, regardless of whether the public employer chooses to place them inside or outside its fire department.

In contrast, the petitioner has offered no alternate explanation as to the meaning of the "integral part" test if it were to be viewed as substantively distinct from the "substantially related" test. Nor has the petitioner offered any rationale why Congress or the Labor Department would have intended to treat similarly situated emergency medical service employees differently for purposes of overtime based on their technical inclusion or exclusion from a public entity's fire department. It is against this background that the petitioner's claim that there is a split among the circuits must be evaluated.

Moreover, when the Eleventh Circuit's decision in *Wouters* is carefully examined on the very point advanced by petitioner here—the interrelation between 29 C.F.R. §§ 553.210 and 553.215—it is clear that no split in authority exists. In *Wouters,* the district court had analyzed the dispute as one involving emergency medical service employees employed by a public agency other than a fire department. Subsequently, the emergency medical service personnel and fire fighters were placed in a single "Emergency Services Division." For that reason, the Eleventh Circuit in *Wouters* directed that, on remand, the district court should examine what effect, if any, this change in structure would have on the outcome of the case.

In analyzing this, the Eleventh Circuit noted that "[n]either regulation [§ 553.210(a) or § 553.211(a)] provides guidance about what constitutes an integral part, nor have we interpreted the precise relationship between the integral part and the substantially related standards." *Wouters,* 9 F.3d at 931-32. However, instead of deciding

that issue on the record before it, the Eleventh Circuit remanded for further consideration by the district court. As stated in its opinion:

> The district court did not engage in a separate integral part inquiry at all. Defendant suggests that the integral part test represents a standard that is distinct and applicable to the present facts. *We leave to the district court to analyze the relationship between the "substantially related" and "integral part" standards and their applicability to the present case.*

Id. at 932 (emphasis added).

Therefore, contrary to the petitioner's mistaken contention, the Eleventh Circuit has *not* held that the "integral part" language in 553.210 requires an analysis that is substantively distinct from the test set forth in section 553.215. Rather than rendering a decision on the meaning and interpretation of 29 C.F.R. § 553.210 where the district court had not examined that provision, the Eleventh Circuit took the appropriate step of remanding the issue for initial determination by the district court. Obviously, such action can not be reasonably construed as creating a conflict among the circuits.

Finally, only a few weeks ago, this Court declined to grant a writ of *certiorari* in *Wouters,* No. 93-1867 (Oct. 3, 1994). Succinctly stated, there is no divergence of authority among the circuits and further review of the test to be applied to public sector emergency medical service personnel is unnecessary.

II. THE CLAIMED IMPACT ON THE PETITIONER OF PAYING OVERTIME COMPENSATION TO ITS PARAMEDICS IS IRRELEVANT

The second reason put forward by the petitioner in seeking *certiorari* is the claim that the question of the proper test to apply to paramedics under 29 C.F.R. § 553.210 is "a matter of great financial and operational importance" to public agencies. Pet. 12-13. The peti-

tioner speculates that public agencies will face "immense financial exposure and organization upheaval" by the application of the regulatory standards endorsed by the Fifth, Sixth, and Seventh Circuits. Pet. 13. Consideration need not be given to such unfounded conjecture because the petitioner's discussion of this point is irrelevant in an FLSA enforcement action.

In determining whether employers have failed to comply with the Act, courts are not required to assess what effect compliance will have on the employer's operations. No balancing test exists in which the statutory right of employees to overtime compensation is weighed against the impact on the structure of the employer's operations. The FLSA's overtime protections are broadly construed, and apply unless an employer proves entitlement to an exemption contained in the Act. *Congress* has already balanced the interests of employees and employers through the establishment of exemptions.

Moreover, simply because the petitioner had adopted a system whereby the paramedics were not paid overtime unless they worked in excess of 136 hours in an 18-day work schedule, does not make that practice acceptable under federal law. As this Court emphasized long ago:

> "The Fair Labor Standards Act was not designed to codify or perpetuate those customs or contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights."
>
> Such a conclusion is the only method of achieving the plain design of § 7(a) to spread employment

> through imposing the overtime pay requirement on the employer and to compensate the employee for the burden of a workweek in excess of the hours fixed by the Act.

Jewell Ridge Coal Corp. v. United Mine Workers Local 6167, 325 U.S. 161, 167 (1945) (quoting *Tennessee Coal, Iron and Rail Co. v. Muscoda Local 123*, 321 U.S. 590, 602-03 (1944)). *See also Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 741 (1981).

Congress has spoken clearly on the subject—there is a presumption that employees, including those in the public sector, are entitled to time and one half FLSA overtime compensation for all hours worked in excess of 40 hours in a work week. This presumption is overcome only if the employer can prove that the employees fall within one of the exemptions to the Act. It is no defense to the failure to pay employees FLSA overtime for an employer to claim that its organization is not presently structured to accommodate this obligation.

After benefiting from a system in which the petitioner requires the paramedics to work long hours without paying them overtime unless they work in excess of 136 hours in an 18-day work period, no doubt it may now seem inconvenient to pay these employees for their time and services. Inconvenience or financial hardship do not create an entitlement to the limited overtime exemption contained in section 7(k) of the FLSA.[4] In short, the petitioner's protestations about the effect that paying the paramedics FLSA overtime compensation may have on its current organizational structure and operations are not a proper basis for seeking review in this Court.

---

[4] *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 40 (1944); *see also Torres v. American R. Co.*, 157 F.2d 255, 256 (1st Cir.), *cert. denied*, 329 U.S. 782 (1946) (holding that "the Act does not exempt employers who are in financial difficulties").

III. THE DECISION BELOW DOES NOT IGNORE THE PLAIN LANGUAGE OF THE DEPARTMENT OF LABOR'S REGULATIONS

The third reason offered by petitioner for granting *certiorari* is the argument that the Seventh Circuit's holding "ignores the plain language of the DOL regulations." Pet. 14. As noted above in Point I, that contention is erroneous. Without repeating the discussion, suffice it to note that 29 C.F.R. § 553.210, rather than defining the term "integral part," provides an explicit textual cross-reference to 29 C.F.R. § 553.215, a provision that contains a more detailed criteria to be applied in determining when emergency medical service personnel fall within the narrow overtime exemption contained in section 7(k) of the Act. The Seventh Circuit explained at length the interrelationship of the regulations (Pet. App. 10a-16a), and that cogent analysis is fully supported by the Labor Department's statement when it issued these regulations [*See* 52 Fed. Reg. 1012 *et seq.* (January 16, 1987)]. The clear intent of section 553.210, when read in conjunction with section 553.215—as instructed in the regulation itself—is that public sector emergency medical service employees are subject to the section 7(k) partial overtime exemption only where their duties are *substantailly related* to fire protection or law enforcement activities.

Thus, rather than being in conflict with the plain language of the regulations, the decision of the court below, as well as the holdings by the Sixth Circuit in *Justice* and the Fifth Circuit in *Bond*, are entirely consistent with the Labor Department's regulations on this point. These holdings also further the statutory purpose of providing a uniform standard under which similarly situated emergency medical service employees are to be treated similarly in determining their entitlement to overtime compensation under the FLSA.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be denied.

Respectfully submitted,

THOMAS A. WOODLEY
(*Counsel of Record*)
DOUGLAS L. STEELE
MULHOLLAND & HICKEY
1125 15th Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 833-8855

STEPHEN B. HORWITZ
JACOBS, BURNS, SUGARMAN
& ORLOVE
300 West Washington Street
Suite 1200
Chicago, IL 60606-2002
Attorney for Respondents